BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
CHRISTOPHER X. O'CONNOR **No. 15-03**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO.'s L12014065616, L0067908560, L1141650384 and L0604779472

AMENDED DECISION AND ORDER

On January 22, 2015, this decision was amended in order to correct a clear address error and the spelling of Mr. O'Connor's last name from the original decision and order filed on December 22, 2014. No other substantive changes were made to the decision and order.

A protest hearing occurred on the above captioned matter on October 14, 2014 before Brian VanDenzen, Esq., Hearing Officer, in Santa Fe. Christopher X. O'Connor ("Taxpayer") appeared *pro se*. Staff Attorney Elena Morgan appeared representing the State of New Mexico, Taxation and Revenue Department ("Department"). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Taxpayer Exhibits #1-11 and Department Exhibits A-G were admitted into the record, as described more thoroughly in the Administrative Protest Hearing Exhibit Log. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On July 16, 2014, the Department assessed Taxpayer for $656.10 in gross receipts tax, $131.22 in penalty, and $133.58 in interest for a total assessment of $920.90 for the combined reporting period ending on December 31, 2008. [Letter id. no. L2014065616].

2. On July 16, 2014, the Department assessed Taxpayer for $731.87 in gross receipts tax, $146.38 in penalty, and $115.53 in interest for a total assessment of $993.78 for the combined reporting period ending on December 31, 2009. [Letter id. no. L0067908560].

3. On July 16, 2014, the Department assessed Taxpayer for $565.06 in gross receipts tax, $113.01 in penalty, and $66.73 in interest for a total assessment of $744.80 for the combined reporting period ending on December 31, 2010. [Letter id. no. L1141650384].

4. On July 16, 2014, the Department assessed Taxpayer for $559.86 in gross receipts tax, $111.98 in penalty, and $45.98 in interest for a total assessment of $717.82 for the combined reporting period ending on December 31, 2011. [Letter id. no. L0604779472].

5. On July 24, 2014, Taxpayer protested the Department's assessments, arguing that he was not a business subject to gross receipts tax, that to impose gross receipts on him would be unfair double taxation, and that in a previous telephone conversation he had with a Department employee he believed that this issue had been resolved.

6. On August 27, 2014, the Department requested a hearing in this matter with the Hearings Bureau.

7. On August 29, 2014, the Hearings Bureau sent Notice of Administrative Hearing, scheduling this matter for a hearing on October 14, 2014.

8. Taxpayer at all relevant time was a licensed nurse in New Mexico. [Taxpayer Ex. #7].

9. Taxpayer has long cared for developmentally disabled patient named David in David's home. [Taxpayer Ex. #1].

10. Taxpayer, as an employee of Gentiva Health Service receiving a salary and accompanying W-2's, began to provide in home nursing care for David when David was a five-year old child. [Taxpayer Ex. #1].

11. When David turned 21, he moved from the New Mexico Medically Fragile Child Program to the New Mexico Developmental Disabilities Waiver Program ("DD Waiver"). [Taxpayer Ex. #1].

12. Taxpayer's employer Gentiva Health Services did not participate in the DD Waiver program and therefore no longer provided care to David. [Taxpayer Ex. #1].

13. For the purposes of the DD Waiver program, David's mother is listed as David's caregiver. [Taxpayer Ex. #1].

14. David's mother directly receives payments from the DD Waiver program for David's case. The DD Waiver program allows David's mother to make payments to others for David's respite care. [Taxpayer Ex. #1].

15. Since Taxpayer had a long history of providing in-home care to David, David's mother paid Taxpayer for respite care. [Taxpayer Ex. #1].

16. David's mother sets Taxpayer's schedule for providing respite care to David, with the hours varying depending on David's mother's schedule and need for relief.

17. Taxpayer does not have a written agreement to provide services to David.

18. Taxpayer does not prepare written reports to David's mother.

19. Taxpayer monitors David's medical status with David's mother.

20. Taxpayer provides information and contraindications regarding David's prescribed medication.

21. Taxpayer will alert David's mothers of any medical issues that arise while in Taxpayer's care.

22. Taxpayer uses the equipment at David's home to care for David.

23. Taxpayer is not reimbursed for his professional licensure expenses by David's mother.

24. Taxpayer is paid an hourly wage of $10.00 per hour for preparing services for David, and $18.75 per hour when he is actually providing services to David.

25. Beginning in June of 2006, Taxpayer received payment directly from David's mother for Taxpayer's in-home care of David. [Taxpayer Ex. #1].

26. David's mother did not withhold any taxes from her payments to Taxpayer and did not annually provide Taxpayer with W-2's.

27. David's mother did not make any unemployment insurance contributions on Taxpayer's behalf.

28. Taxpayer is not covered by worker's compensation insurance for his work with David.

29. There is no evidence on the record that David's mother considers Taxpayer an employee.

30. There is no evidence on the record that David's mother is paying FICA tax on Taxpayer's work.

31. Taxpayer began to make quarterly estimated personal income tax payments on the money he received for providing David's care in 2008, 2009, 2010, 2011.

32. After David's mother spoke with her accountant, David's mother informed Taxpayer that he would need to fill out a federal Schedule SE for the money she paid him for David's care.

33. Taxpayer filled out federal Schedule SE and Schedule C-EZ forms as part of preparing his federal income tax returns during the relevant time. Taxpayer acknowledged for the purposes of preparing his federal income tax returns, he had income as a self-employed business.

34. Taxpayer claimed a deduction for business expenses on his federal income tax returns during the relevant time.

35. Taxpayer did not file or pay New Mexico gross receipts during the relevant years, the reporting periods of 2008 through 2011.

36. In 2009, Taxpayer also performed services for a William Brown, for which he received a 1099-MISC for non-employee compensation. [Department Ex. G].

37. On July 23, 2010, Taxpayer was offered an opportunity to enter into the tax amnesty program for gross receipts tax in tax year 2007. The amnesty offer included a specific contact person at the Department. Taxpayer contacted the listed Department employee telephonically and explained his situation of providing care for David. After Taxpayer explained his situation, the Department employee told Taxpayer he would cancel the matter without any further action on the 2007 gross receipts tax.

38. As of the date of hearing, for 2008, Taxpayer owed $656.10 in gross receipts tax, $131.22 in penalty, and $138.22 in interest for a total 2008 liability of $926.08. In 2009, Taxpayer owed $731.87 in gross receipts tax, $146.38 in penalty, and $121.30 in interest for a total 2009 liability of $999.55. In 2010, Taxpayer owed $565.06 in gross receipts tax, $113.01 in penalty, and $71.19 in interest for a total 2010 liability of $749.26. In 2011, Taxpayer owed

$559.86 in gross receipts tax, $111.98 in penalty, and $50.40 in interest for a total 2011 liability of $722.24. As of the date of hearing, Taxpayer had a total outstanding liability of $3,397.13. [Department Ex. A].

DISCUSSION

The main issue in this case is whether Taxpayer was a person engaged in business liable for the payment of gross receipts tax in 2008, 2009, 2010, and 2011. Taxpayer also argued that requiring him to pay gross receipts tax when he already paid income tax was excessive double taxation and that passing the gross receipts tax onto David's mother was distasteful. The final issue is whether Taxpayer is liable for penalty in light of his conversation with a Department employee.

Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are presumed correct. Consequently, Taxpayer has the burden to overcome the assessments. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Moreover, "[w]here an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447. Once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the receipts of any person engaged in business. *See* NMSA 1978, § 7-9-4 (2002). "Engaging in

business" is defined as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2003). Gross receipts applies to the performance of a service in New Mexico. *See* NMSA 1978, § 7-9-3.5 (2007). Although Taxpayer clearly had a good intentions to help David and his family, Taxpayer nevertheless was also performing nursing services for David for direct monetary benefit. Consequently, under the definition contained under Section 7-9-3.3, Taxpayer was a person engaged in business. Under the Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a person engaged in business are taxable. *See* NMSA 1978, § 7-9-5 (2002). Since Taxpayer was a person engaged in business, it is presumed that all of Taxpayer's receipts from performing services were subject to gross receipts tax.

However, exempted from gross receipts taxes are the wages of employees. *See* NMSA 1978, § 7-9-17. It is undisputed that Taxpayer was an employee of Gentiva. When Taxpayer was an employee of Gentiva, he was not required to register for a CRS number, file or pay gross receipts tax. *See* § 7-9-5 (A) and Regulation 3.2.100.8 NMAC. Because Gentiva was not in the DD Waiver program, it could no longer provide services to David. In order to continue to work with David providing respite care, Taxpayer started accepting direct payment from David's mother for services performed. Taxpayer believed that because he was performing the same services for David as he had when employed by Gentiva, he still should be considered an employee not subject to gross receipts tax rather than a business. But the question is not whether Taxpayer performed the same services as he had previously done as an employee, but whether he was an employee eligible for the exemption of tax under Section 7-9-17.

Regulation 3.2.105.7 (A) NMAC lists seven criteria for the Department to use in determining whether a person is an employee for the purposes of the exemption under Section 7-9-17:

> A. In determining whether a person is an employee, the department will consider the following indicia:
> (1) is the person paid a wage or salary;
> (2) is the "employer" required to withhold income tax from the person's wage or salary;
> (3) is F.I.C.A. tax required to be paid by the "employer";
> (4) is the person covered by workmen's compensation insurance;
> (5) is the "employer" required to make unemployment insurance contributions on behalf of the person;
> (6) does the person's "employer" consider the person to be an employee;
> (7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

Under Regulation 3.2.105.7 (B) NMAC, "[i]f all of the indicia mentioned Subsection A of Section 3.2.105.7 NMAC are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present."

Applying the criteria under Regulation 3.2.105.7 (B) NMAC to the facts of this case, Taxpayer did not establish that he was an employee of David's mother, exempt from gross receipts tax under Section 7-9-17. Two factors do support that Taxpayer may have been an employee: Taxpayer was paid an hourly wage and David's mother set the hours of work and the specific timing of David's care during those hours. In contrast, the remaining factors do not establish that Taxpayer was an employee. David's mother did not withhold income taxes from Taxpayer's pay, did not pay F.I.C.A. taxes, and did not make unemployment insurance contributions on behalf of Taxpayer. There also is no evidence that David's mother considered Taxpayer an employee. In fact, since Taxpayer indicated that David's mother told him about the necessity of doing the federal

Schedule SE for the self-employed, it does not appear that David's mother considered Taxpayer her employee.

Moreover, while Taxpayer did not hold himself out as a person in business, Taxpayer acknowledged that for federal income tax purposes, he reported himself as being self-employed and engaged in business. These federal returns required Taxpayer to sign under penalty of perjury that they were true and correct. Taxpayer also claimed exemptions from federal income tax premised on being self-employed. Considering these facts and that five of the sevens factors under Regulation 3.2.105.7 (B) NMAC do not support that Taxpayer was an employee, Taxpayer did not meet his burden of establishing he was entitled to the exemption from gross receipts tax of wages of an employee under Section 7-9-17. *See Wing Pawn Shop*, ¶16

At a couple of points during the proceeding, Taxpayer complained that the Department either failed to provide clear instructions that he might be subject to gross receipts tax or that if the Department would have acted sooner to make it clear that he would be subject to gross receipts tax, Taxpayer in turn would have resolved the matter much sooner. Regarding timing, all of the Department's assessments were issued timely under NMSA 1978, Section 7-1-18 (C) (in the case of a non-filer of any required return, the Department has seven years from the end of the calendar year in which the tax was due to issue an assessment). Regarding the absence of clear instructions and directions, under New Mexico's self-reporting tax system, "every person is charged with the reasonable duty to ascertain the possible tax consequences" of his or her actions. *Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16. Taxpayer had a responsibility to research the tax consequences of transitioning from an agency employee to performing services directly for David, or consult with an appropriate tax professional about those consequences. Consulting with a tax professional seems particularly pertinent when Taxpayer

himself recognized an apparent contradiction between his legal status on his federal returns as self-employed and his own personal belief that he was not in fact self-employed in business.

Taxpayer argued that the imposition of gross receipts tax was excessive given that he already paid federal and state personal income taxes on the money earned from his care of David. This argument essentially amounts to a claim of double taxation. Double taxation is not prohibited. *See New Mexico State Bd. of Pub. Accountancy v. Grant*, 1956-NMSC-068, ¶11, 61 N.M. 287; *see also New Mexico Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶12, 85 N.M. 565. Gross receipts are an excise tax on all the receipts of a person engaged in business. Gross receipts is a distinct tax from personal income tax and there is no double taxation in having to pay both taxes. *See State ex rel. AG v. Tittmann*, 1938-NMSC-005, 42 N.M. 76. (State may select subjects of taxation so long as equal and uniform; state may impose an excise tax and a personal income tax). Collection of gross receipts, in addition to other taxes, does not amount to impermissible double taxation.

Taxpayer found the idea of passing on the incidence of gross receipts tax to David's mother unseemly. While many taxpayers choose to pass on the cost of the gross receipts tax to the purchaser of their services, there is no requirement that a taxpayer do so. The incidence of gross receipts tax falls on the person engaged in business. *See* Regulation 3.2.4.8 NMAC & Regulation 3.2.6.9 NMAC. Taxpayer is free to make the choice not to pass on the cost of gross receipt tax to David's mother. However, that choice does not relieve Taxpayer of his own obligation to pay the gross receipts tax.

Taxpayer did not specifically address interest and penalty, but because Taxpayer asked for abatement of all taxes, interest and penalty must be considered. When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from

the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp.*, ¶22. The language of Section 7-1-67 also makes it clear that interest begins to run from the original due date of the tax until the tax principal is paid in full. The Department has no discretion under Section 7-1-67 and must assess interest against Taxpayer from the time the 2008, 2009, 2010 and 2011 gross receipts tax was due but not paid until Taxpayer satisfies the gross receipts tax principal.

Under NMSA 1978, Section 7-1-69 (2007), when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, by its use of the word "shall", civil penalty must be added to the assessment. As discussed above, the statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of "negligence."

Regulation 3.1.11.10 NMAC defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required"; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention." Erroneous belief and inadvertent error meets the legal definition of "negligence" under the penalty statute. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶10, 108 N.M. 795. Here, Taxpayer's failure to report and pay gross receipts taxes in 2008 and 2009 constituted negligence under all three prongs of Regulation 3.1.11.10 NMAC.

However, in instances where a taxpayer might otherwise fall under the definition of civil negligence generally subject to penalty, Section 7-1-69 (B) provides a limited exception: "[n]o

penalty shall be assessed against a taxpayer if the failure to pay an amount of tax when due results from a mistake of law made in good faith and on reasonable grounds." Further, in relevant part to this protest, Regulation 3.1.11.11 (A) NMAC allows for abatement of penalty when a "taxpayer proves that taxpayer was affirmatively misled by a department employee." In 2010, Taxpayer received a notice of amnesty for 2007 gross receipts taxes from the Department. When Taxpayer spoke with the Department employee referenced in that notice, Taxpayer disclosed the nature of his work with David. After this explanation, rather than enroll Taxpayer in the amnesty program, the Department employee told Taxpayer that he would close out of the 2007 gross receipts tax matter. While 2007 was not directly at issue in this protest, the fact the Department employee in 2010 told Taxpayer that the dispute of 2007 gross receipts tax was resolved without further action may have reasonably caused Taxpayer to conclude he was not subject to gross receipts thereafter for this service to David. Therefore, Section 7-1-69 (B) and Regulation 3.1.11.11 (A) NMAC requires abatement of penalty in the annual reporting periods of 2010 and 2011, both of which post-dated Taxpayer's conversation with that employee. With the exception of the abatement in penalty in these two years, Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. Taxpayer filed a timely, written protest to the assessments. Jurisdiction lies over the parties and the subject matter of this protest. The hearing was timely set as required under NMSA 1978, Section 7-1-24.1 (A) (2013).

B. Taxpayer did not overcome the presumption of correctness that attached to the assessments under NMSA 1978, Section 7-1-17 (C) (2007) and *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428.

C. By performing services for David for direct monetary benefit, Taxpayer was a person engaged in business under NMSA 1978, Section 7-9-4 (2002).

D. As a person engaged in business, all of Taxpayer's receipts in 2008, 2009, 2010, and 2011 are presumed subject to gross receipts tax under NMSA 1978, Section 7-9-5 (2002).

E. Taxpayer did not carry his burden to establish he was an employee subject to the exemption under NMSA 1978, Section 7-9-17 because five of the seven criteria under Regulation 3.2.105.7 (A) NMAC were against Taxpayer and Taxpayer self-reported that he was a person in business on his federal tax returns. *See Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735.

F. Under NMSA 1978, Section 7-1-67 (2007), Taxpayer is liable for accrued interest under the assessment. Interest continues to accrue until the tax principal is satisfied.

G. Under NMSA 1978, Section 7-1-69 (2007), Taxpayer is liable for civil negligence penalty in 2008 and 2009 because Taxpayer's inaction and inattention met the definition of civil negligence under Regulation 3.1.11.10 NMAC.

H. However, because in 2010 he relied on the statements of a Department employee closing out a gross receipts issue in 2007 to conclude that gross receipts taxes were not required for the nursing services to David he performed, under Section 7-1-69 (B) and Regulation 3.1.11.11 (A) NMAC Taxpayer is entitled to abatement of civil negligence penalty in 2010 and 2011.

For the foregoing reasons, Taxpayer' protest **IS GRANTED IN PART AND IS DENIED IN PART**. Penalty is abated in 2010 and 2011. Taxpayer owes the remaining outstanding balance under the assessments. As of the date of hearing, for 2008, Taxpayer owed $656.10 in gross receipts tax, $131.22 in penalty, and $138.22 in interest for a total 2008 liability of $926.08. In 2009, Taxpayer owed $731.87 in gross receipts tax, $146.38 in penalty, and $121.30 in interest for a total

2009 liability of $999.55. In 2010, Taxpayer owed $565.06 in gross receipts tax and $71.19 in interest for a total 2010 liability of $636.25. In 2011, Taxpayer owed $559.86 in gross receipts tax and $50.40 in interest for a total 2011 liability of $610.26.

DATED: January 22, 2015.

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NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (1989), the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. Either party filing an appeal shall file a courtesy copy of the appeal with the Hearing Bureau contemporaneous with the Court of Appeals filing so that the Hearing Bureau can begin to prepare the record proper.